

Date of Hearing: June 24, 2008

ASSEMBLY COMMITTEE ON JUDICIARY
Dave Jones, Chair
SB 1608 (Corbett) – As Amended: May 27, 2008

As Proposed to be Amended

SENATE VOTE: 40-0

SUBJECT: COMPLIANCE WITH DISABILITY ACCESS LAWS

KEY ISSUE: SHOULD THE LEGISLATURE ENACT THIS SIGNIFICANT EFFORT TO IMPROVE DISABILITY ACCESS COMPLIANCE AMONG BUSINESSES OPEN TO THE PUBLIC WHILE SEEKING TO PRESERVE THE FUNDAMENTAL AND CRITICAL CIVIL RIGHTS OF PERSONS WITH DISABILITIES?

SYNOPSIS

This measure to improve disability access compliance by businesses that serve the public reflects bipartisan consensus owing to lengthy negotiations between business interests and some disability rights advocates over a number of years. It has five core pieces: (1) it establishes a process by which a business may obtain an assessment of whether its premises comply with disability access laws by retaining a certified access specialist (CAsp), and allows such businesses to obtain a temporary stay of any litigation if they are sued for violation of accessibility standards, along with an in-person early evaluation conference with the court; (2) it clarifies the standards for awarding damages and attorney's fees with respect to a claim alleging a violation of construction-related accessibility standards; (3) it requires an attorney, when serving a written demand for money or a complaint on a defendant, to include a written advisory to the defendant of the defendant's rights and obligations; (4) it requires architects, as a condition of continued licensure, to complete coursework regarding disability access requirements for the first time, and similarly requires that at least 8 of the minimum 45 hours of continuing education by construction inspectors, plans examiners, and building officials relate to disability access requirements; (5) it creates a California Commission on Disability Access (CCDA) with specified membership and provides the CCDA with the on-going general responsibility for monitoring disability access compliance in California, and making recommendations to the Legislature for necessary changes in order to facilitate implementation of state and federal laws on disability access. In light of the proposed amendments, the remaining opposition is focused largely on issues regarding the Commission, which the authors acknowledge is still in the process of refinement, along with some lingering concerns among the opponents regarding whether the inspection, stay and evaluation conference procedures will be as workable and effective as the supporters hope.

SUMMARY: Seeks to enact comprehensive reform of laws designed to improve voluntary compliance with longstanding disability access obligations among places of public accommodation while attempting to protect the fundamental and critical civil rights of persons with disabilities. Specifically, this bill:

- 1) Establishes a process by which a business open to the public may obtain an assessment of whether the premises comply with existing disability access laws by retaining a certified access specialist (CAsp) to prepare a report regarding the condition of the facility and a statement of opinion regarding whether the facility meets applicable construction-related accessibility standards. As an incentive to obtain this voluntary assessment and in recognition of the value in doing so as a means of promoting greater knowledge of an voluntary compliance with accessibility standards, this bill establishes a process by which such a business may obtain a temporary stay of any litigation if it is sued for violation of accessibility standards, along with an in-person early evaluation conference with the court, attended by persons with authority to resolve the dispute, and a specified exchange of information between the parties, for the purpose of deterring frivolous cases and evaluating prospects for early settlement, including whether any corrections noted in the assessment by the CAsp have been or are being made.
- 2) Clarifies the standards for awarding damages and attorney's fees with respect to a claim alleging a violation of construction-related accessibility standards.
- 3) Requires an attorney, when serving a written demand for money or a complaint on a defendant, to include a written advisory to the defendant of the defendant's rights and obligations, including specifically the right of a qualified defendant to request a stay and an early evaluation conference of the allegations in the complaint. This written advisory would be required from an attorney only, not from a pro se plaintiff.
- 4) Requires architects, as a condition of continued licensure, to complete coursework regarding disability access requirements for the first time.
- 5) Requires that at least 8 of the minimum 45 hours of continuing education by construction inspectors, plans examiners, and building officials in every 3-year period relate to disability access requirements, specifies the areas to be covered by the coursework, and allows a local government to charge or increase inspection fees to the extent necessary to offset any added costs incurred in complying with this requirement.
- 6) Creates a California Commission on Disability Access (CCDA) with specified membership and provides the CCDA with the on-going general responsibility for monitoring disability access compliance in California, and making recommendations to the Legislature for necessary changes in order to facilitate implementation of state and federal laws on disability access.
- 7) Specifies that the provisions regarding litigation described above shall become operative only upon funding and commencement of operations by the CCDA.

EXISTING LAW:

- 1) Provides for the licensure and regulation of persons engaged in the practice of architecture by the California Architecture Board. (Bus. & Prof. Code Section 56000 *et seq.*)
- 2) Requires all construction inspectors, plans examiners, and building officials to complete a minimum of 45 hours of continuing education for every 3-year period, as specified. (Health and Safety Code 18949.29.)

- 3) Provides pursuant to the federal Americans with Disabilities Act (ADA) that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases, or leases to, or operates a place of public accommodation. (42 U.S.C. Section 12181.)
- 4) Provides that a person who is aggrieved by a violation of Civil Code § 54 or § 54.1 may bring an action to enjoin the violation, and entitles the prevailing party to recover reasonable attorney's fees. (Civil Code Section 55.)
- 5) Provides, pursuant to the Unruh Civil Rights Act (UCRA), that all persons, regardless of sex, race, color, religion, ancestry, national origin, disability or medical condition, are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. (Civil Code § 51.) A violation of the ADA also constitutes a violation of the UCRA. A violation of this section subjects a person to actual damages incurred by an injured party, plus treble actual damages but not less than \$4,000, and any attorney's fees as the court may determine to be proper. (Civil Code § 52.) Case law provides that a plaintiff is not required to show intentional discrimination in order to recover under Unruh. (*Hubbard v. Twin Oaks Health and Rehabilitation Center*, E.D. Cal.2004, 408 F.Supp.2d 923 (2004).) (*See also Lonberg v. City of Riverside*, C.D. Cal.2004, 300 F.Supp.2d 942 (2004) (pedestrian was not required to prove city's intent to discriminate where city failed to provide wheelchair access to curb ramps).)
- 6) Provides for the creation of various commissions charged with specific tasks, such as the Commission on the Status of Women, Little Hoover Commission, and others. (*E.g.*, Government Code Section 8241 *et seq.*)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: As grounds for the bill the joint authors state that SB 1608 is a comprehensive reform measure intended to promote better compliance with the Americans with Disabilities Act, as well as the state's own equal access laws. It is a multi-faceted approach that attempts to address the problem of non-compliance in several ways, primarily, the authors state, by recognizing the value of and promoting voluntary compliance and prevention.

According to the authors, since 1969, persons with disabilities have enjoyed protection under Civil Code sections 54 and 54.1, which entitle individuals with disabilities and medical conditions to full and free access to and use of roadways, sidewalks, buildings and facilities open to the public, hospitals and medical facilities, and housing. After Congress enacted the Americans with Disabilities Act (ADA) in 1990, the state made a violation of the ADA also a violation of sections 54 and 54.1. The state protections provided to individuals with disability are comparatively higher than those provided under the ADA and are independent of the ADA.

A violation of section 54 or section 54.1 makes a person liable for actual damages plus a maximum of three times the actual damages (but not less than \$1,000), plus attorney's fees and costs. In a private right of action under the ADA, a plaintiff may obtain injunctive relief and attorney's fees, while an action by the U.S. Attorney may bring equitable relief, monetary damages on behalf of the aggrieved party, and a civil penalty of up to \$100,000.

In addition, under the Unruh Civil Rights Act (UCRA) all persons, regardless of sex, race, color, religion, ancestry, national origin, disability or medical condition, are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. (Civil Code Section 51.) A violation of the ADA also constitutes a violation of the UCRA. A violation of this section subjects a person to actual damages incurred by an injured party, plus treble actual damages but not less than \$4,000, and any attorney's fees as the court may determine to be proper. (Civil Code Section 52.)

Despite these longstanding access requirements, there has been considerable controversy regarding the extent to which businesses open to the public are aware of and comply with these obligations, and the proper role of private litigation in the enforcement scheme. This controversy has been more difficult to resolve in part because there is so little if any public prosecution of access violations, and thus private enforcement efforts are central to the means by which the law, like other civil rights laws, is designed to be enforced. In each legislative session over nearly the past decade there have been various proposals to revise the disability access enforcement statutes. This bill reflects a multi-year process by which, despite their differing perspectives, frustration and resentment, supporters of this bill put aside their initial differences and made a good faith effort to reach consensus.

The Role Of The Certified Access Specialist (Casp). This bill builds on the success first achieved in SB 262 (Kuehl, Ch. 872, Stats. 2003), which established in the Division of the State Architect a voluntary "access specialist certification program" in order to assist business and property owners to comply with ADA and state access laws. That bill also authorized an enforcement action with civil penalties for noncompliance with ADA and state access laws, after notification of the business owner or operator by a government agency. The authority to institute a civil action was extended to county counsels (in addition to the Attorney General, district attorney, and city attorney). According to the Division of the State Architect, the first group of Certified Access Specialists will be certified this year or early next year.

Under SB 1608, the CASp would play a central role in the implementation of the new procedure for resolving claims related to construction-related accessibility violations. Unless the site identified in a complaint is a CASp-inspected site (inspected and determined to meet applicable construction-related accessibility standards) or a CASp-determination pending site (inspected, but determination that it meets applicable construction-related accessibility standards is pending), a defendant in a lawsuit alleging disability access violations including violations of Civil Code sections 51, 54, 54.1, or 55, cannot take advantage of the early evaluation conference designed to resolve construction-related accessibility violation claims within months of the complaint being filed.

The CASp Written Inspection Report. SB 1608 would require a certified access specialist, upon completion of the inspection of a site, to prepare a report stating the condition of the premises and any corrections made or needed in the opinion of the CASp to meet construction-related accessibility standards. If corrections are needed, the CASp is to identify the plan and schedule for making the corrections.

Notice To Building Owner Or Tenant And Disability Inspection Certificate. SB 1608 would require a CASp, upon completion of inspection of a site, to provide the building owner or tenant who requested the inspection with a specified notice which the State Architect would make

available on its Web site. The specific notice prescribed in the bill (proposed Sec. 55.53(c)) would advise the owner/tenant to keep the written inspection report in their records, as well as any other documentation given to them by the CASp; advise that the owner/tenant may be entitled to a stay of the claim and an early evaluation conference, in case they become defendants in a lawsuit concerning the inspected site; advise the owner/tenant about requesting the stay and early evaluation conference; and advise the owner/tenant that they are entitled to request from a CASp who has inspected their property a written inspection report and other documentation. The notice would also advise the owner/tenant that they are entitled to request the issuance of a Disability Access Inspection Certificate, which may be posted on the property, if the property is found to meet applicable construction-related accessibility standards.

A facsimile of the Disability Access Inspection Certificate may be found in the attached mockup of the bill. These certificates would become available beginning on March 1, 2009.

The Disability Access Inspection Certificate would be issued only if the site inspected has been determined by the CASp to meet applicable construction-related accessibility standards, and not before. Further, an inspection certificate displayed on the window of a place of public accommodation would not preclude a person with disability from claiming access violations on the site, whether or not related to the physical accessibility of the inspected site. Further, if any construction changes take place after the date of inspection indicated on the inspection certificate, the certificate must be taken down, the site must be inspected again and a new determination that it meets applicable standards must be made before a new certificate may be posted.

Local Building Inspectors As CASps. SB 1608 would require all inspections of a privately owned place of public accommodation that relate to permitting, plan checks, or new construction, including those of tenant improvements that may impact access, to be conducted by building inspectors who are certified access specialists. In order to promote timely compliance, SB 1608 would require a local agency to employ or retain a sufficient number of building inspectors, of whom at least one would have to be a CASp. The local agency would be authorized to charge or increase inspection fees to the extent necessary to offset the costs involved.

The California Chamber of Commerce, a proponent of SB 1608, believes that compliance will be promoted by encouraging existing building owners to voluntarily utilize certified access specialists who have passed state-established experience, education, and testing standards in disability access requirements.

The New Procedure For Construction-Related Accessibility Claims: Early Evaluation Conference And Stay. SB 1608 would establish a special procedure for complaints filed that allege construction-related accessibility violations of the full and equal access laws, including violations of Civil Code sections 51, 54, 54.1, or 55. This procedure would be available only where the defendant is a “qualified defendant” because the place of public accommodation that is the subject of the accessibility claim or claims is a “CASp-inspected” or a “CASp determination pending” site.

Attorney To Serve Notice And Application Form For Stay And Early Evaluation Conference Together With Complaint Or Notice Of Substitution Of Counsel. The bill would require a plaintiff’s attorney, at the time defendant is served with a complaint, to also serve a notice in the

form specified in the bill and a copy of the form for defendant's request for a stay and an early evaluation conference (EEC). An attorney who substitutes into the case after a pro per plaintiff had filed and served the complaint would be required to serve this notice and request for stay and EEC form together with the Notice of Substitution of Counsel.

The language of the notice is prescribed in the bill. The notice informs the defendant that:

- He or she may be entitled to a stay and EEC, if the accessibility claim in the complaint pertains to a site that has been CASp-inspected or is CASp determination pending;
- Upon filing of the request the court will schedule an EEC to be held within 50 days of the filing date of the request and will grant an immediate stay, unless the plaintiff had first obtained a temporary restraining order in the accessibility claim. More information and copies of these forms would be made available on the Judicial Council's Web site;
- The application may be filed after service of the complaint and summons, but no later than defendant's first pleading or appearance in the case (which is due 30 days from service). Pro per defendants who want more information would be directed to the Judicial Council's Web site for self help, <http://www.courtinfo.ca.gov/selfhelp>;
- If the plaintiff hires an attorney after the summons and complaint had been served, the defendant will have 30 days from receipt of a Notice of Substitution of Counsel to file an application for a stay and EEC.

New Process Designed To Facilitate Early Settlement, Particularly By Pro Per Parties. Under SB 1608, a request for stay and early evaluation conference may be filed by a pro per qualified defendant prior to or together with the filing of a responsive pleading after the defendant was served with the summons and complaint, even if defendant was not served with the specified forms (which would occur if the plaintiff is a pro per plaintiff). The authors state that this provision was crafted specifically to promote the measure's goal of moving the parties toward an early settlement of the plaintiff's claims, particularly if the plaintiff or defendant, or both, are representing themselves.

Thus, while the bill would not require a pro per plaintiff to serve the defendant with the written advisory regarding the defendant's opportunity to request a stay and early evaluation conference of the claim and the forms for making that request, a qualified defendant who wants to find this information and the forms to make the request may go to the Judicial Council self help Web site to download the material.

Application Form To Be Developed By The Judicial Council; Declaration Regarding CASp Inspected Site. SB 1608 would specify the contents of the provisional form for the Defendant's Application for Stay and Early Evaluation Conference, and require that the application include a signed declaration that (1) the site identified in the complaint has been CASp-inspected or is CASp-determination pending; and (2) an inspection report pertaining to the site has been issued by a CASp and shall be provided to the court and plaintiff at least 15 days prior to the date set for the EEC.

In order to ensure plaintiffs and pro per qualified defendants have access to the forms and instructions on using the EEC procedure, the Judicial Council would be directed to post the following on their Web site: the application form for the stay and EEC, the court's notice of stay and early evaluation conference, instructions, and a cover page to assist plaintiffs and defendants,

respectively, to comply with their filing responsibilities prior to the EEC date, and the declaration of proof of service of the pertinent documents. Until forms are formally adopted, the Judicial Council would post the provisional forms included in the bill.

In the provisional form, and in the form to be adopted by the Judicial Council, the defendant's declaration asserting the possession of a CASp inspection report for the site of the alleged disability access violations, which report will be provided to the court and the plaintiff, must be signed under penalty of perjury.

Court To Grant Stay, Schedule Early Evaluation Conference, And Direct Parties To File And Exchange Documents Prior To EEC Date. Upon filing of the request for stay and EEC by a qualified defendant, the court, under SB 1608, would grant a stay for 90 days and schedule a mandatory EEC for a date no later than 50 days after issuance of the order but no earlier than 21 days after the filing of the request.

The authors state that these time periods were selected to accommodate the exchange of documents between defendant and plaintiff at least 15 days prior to the date of the EEC. Defendant would be required to file with the court and serve plaintiff the CASp inspection report. Plaintiff would be required to file with the court and serve on defendant a statement containing: (1) an itemized list of conditions on the site that are the basis for the claimed violations of construction-related accessibility standards in the complaint; (2) the amount of damages claimed; (3) the amount of attorney's fees and costs incurred to date, if any, that are claimed; and (4) any demand for settlement of the case in its entirety.

If the defendant fails to provide the CASp inspection report for which he or she signed a declaration when the request for stay was filed, prior to the EEC or at the time of the early evaluation conference itself, the court would be required to lift the stay, unless the defendant shows good cause for the failure to provide the inspection report. A defendant who wrongly claimed the right to a stay and EEC would also be subject to potential sanctions by the court pursuant to existing law.

The Early Evaluation Conference: Purpose And Rules. SB 1608 expressly states the intent of the Legislature that the purpose of the EEC is to determine: (1) whether the defendant is entitled to the stay for some or all of the identified issues, as a qualified defendant; (2) whether the qualified defendant has corrected or is willing to correct the alleged violations, and the timeline for doing so; and (3) whether the case can be settled in whole or in part.

Thus, the following rules would apply to the conference and the parties participating in the EEC:

- The parties, and any other person whose authority is required to negotiate and enter into settlement, are directed to appear in person at the EEC (appearance by counsel will not suffice);
- A party failing to comply with any court order (serving the CASp inspection report or the statement of damages, for example) may be subject to sanctions at the court's discretion;

- The court shall lift the stay when defendant has failed to file and serve the CASp inspection report at the time required and also did not produce the CASp inspection report at the time of the EEC, unless there was good cause shown for that failure;
- The court may lift the stay at the conclusion of the EEC upon a showing of good cause by plaintiff;
- The stay provisions shall not apply to any accessibility claim in which the plaintiff has been granted temporary injunctive relief that remains in place;
- All discussions at the EEC shall be subject to Evidence Code § 1152;
- The parties are not precluded from making C.C.P. section 998 offers to compromise at any time;
- The court may, for good cause shown, schedule additional conferences and may extend the 90-day stay for no more than an additional 90 days;
- The new procedure (stay and EEC procedure) shall not be construed to invalidate or limit any California construction-related accessibility standard that provides greater or equal protection for the rights of persons with disabilities than is afforded by the ADA and the federal regulations adopted pursuant to that act;
- In determining an award of attorney's fees and costs, the court may consider settlement offers made and rejected by the parties, as specified.

According to some proponents, the requirement that parties attend the EEC in person is crucial to the potential success of this new procedure for construction-related accessibility claims. Reducing unnecessary attorney's fees in litigation of disability access claims while improving compliance with the equal access laws is an overarching goal of proponents of SB 1608. Therefore, the EEC is perceived as the forum where the parties can in fact confront each other early in the process and try to achieve resolution of some, if not all, of the violations alleged. Without the parties' presence, this would not be possible. However, some accommodation should be made for a plaintiff who is not able to attend the EEC due to his or her disability.

Damages May Be Recovered If Plaintiff Is Actually And Personally Deterred. SB 1608 would provide that damages may be recovered for a violation of a construction-related accessibility standard, such that both persons who actually encounter a violation as well as those who are deterred, as specified, are entitled to recover damages for inability to enjoy full and equal access to the place of public accommodation

The Demand For Money Letter: Attorney's Written Advisory – Not Applicable To Pro Per Plaintiff. SB 1608 would require an attorney to provide with each demand for money or complaint sent to or served upon a defendant the written advisory. The bill would require this advisory to be separate and clearly distinguishable from the demand for money letter. The text of the written advisory is prescribed in the bill.

The written advisory is intended to inform property owners and tenants of their rights as potential defendants in a case involving construction-related accessibility claims. Specifically, it would advise the defendant or potential defendant that he or she has important legal obligations, that compliance with disability access laws is required of all owners of and tenants in buildings that are open for business to the public, and where to find the disability access laws. It also would advise the recipient that a letter demanding money does not mean the recipient is required to pay any money until a court finds the recipient liable. The written advisory would advise the recipient of options in the event a complaint is filed against him or her, including the option of filing a request for a stay and early evaluation conference if the recipient's place of public accommodation has been inspected by a certified access specialist. It would direct the recipient of the written advisory to the Judicial Council site where information and forms may be found.

Proponents believe this written advisory to defendants and potential defendants will assist small businesses who are not sophisticated in the law in understanding their rights and obligations with respect to disability access claims that may be brought against them. Because many of these small businesses are owned or operated by people who may not speak English or who may be limited-English speaking, the availability of the written advisory in various languages would help educate these business people about disability access laws and what they can do to comply and minimize their exposure.

The bill would require the Judicial Council, by July 1, 2009, to adopt a form that may be used by attorneys to comply with this written advisory requirement. The form shall be in 14-point boldface type and shall be available in English, Spanish, Chinese, Vietnamese, and Korean, and shall include a statement that the form is available in other languages at the Judicial Council's Web site, which address is to be provided on the form itself.

This written advisory requirement would not apply to plaintiffs who are not represented by attorneys. Further, SB 1608 expressly provides that a pro per plaintiff is not required to send a demand for money letter to another party before proceeding against that party with a civil complaint.

Continuing Education Of Architects And Building Inspectors. SB 1608 also would impose continuing education requirements on architects and building inspectors, as part of their license renewal processes.

The American Institute of Architecture (AIA) has stated that it "does not oppose the concept of continuing education as a condition of licensure...AIA requires continuing education as a condition of membership in the AIA, a requirement that includes eight hours of continuing education annually on topics related to protecting the health, safety, and welfare of the public." The AIA suggests continuing education of 8 hours every year, with one hour dedicated to disability access laws and regulations, arguing that "a comprehensive continuing education approach with a disability access component... recognizes that not all architects provide the same type of services... [a]rchitects who specialize in disability access, whether as independent consultants or in-office experts, will spend more than one hour per year on disability access education...[a]rchitects who design project types that are not public accommodations and do not require disability access...or in-office experts on a non-disability access subject, such as sustainable buildings, will still have to spend the minimum amount of time each year on disability access continuing education."

The proposed coursework requirements for architects reflect proponents' view that while 5 hours of coursework every two years may not be enough considering the breadth of knowledge of disability access laws that architects should have, one hour of coursework every year is insufficient.

The California Architects Board (Board) has taken a "Support if Amended" position on SB 1608, expressing concerns that "a piecemeal approach to continuing education could lead to mandates in areas that may not be in the public's best interest. In addition, we are also concerned that such a scenario could create license reciprocity problems, thereby making it tougher for California to "export" architecture services and bolster our economy. Accordingly, we propose an amendment to give the Board the statutory directive to develop and adopt a continuing education program focusing on health, safety, and welfare content (e.g., exiting, seismic safety, fire prevention, etc.), including disabled access. This is a much more viable approach and we understand that the profession would likely be supportive as well. We are also concerned about the new process the bill identifies and the role for the CASp. If our goal is to improve accessibility, it is important to recognize that design and construction is a highly complex process with numerous parties and a wide range of checks and balances. If we are to place the CASp in a position of great responsibility, it also seems logical to inform consumers about accountability. Accordingly, we recommend that CASp certificate holders be required to inform clients via written notification whether they have liability insurance.

Building Standards Commission Appeal – To Be Deleted By Proposed Amendments. As set out in more detail below, many of the opponents have focused their concerns on a provision in the bill allowing a property owner to appeal to the state Building Standards Commission when the building owner is dissatisfied with a local building official's determination. In response to those concerns, the authors propose to delete that provision (section 6 of the bill in print) in the amendments to be offered in Committee.

California Commission on Disability Access. SB 1608 would create the California Commission on Disability Access (CCDA) similar to the California Commission on the Status of Women, with the specific charge of monitoring compliance with state and federal equal access laws across the state and making recommendations to the Legislature for necessary changes in order to facilitate implementation of those laws. The Commission would be established on or before May 1, 2009.

The CCDA would be composed of members appointed by the Legislature and the Governor, representing the disability community, businesses, and the public, as well as representatives of the Attorney General and the State Architect.

The CCDA meetings would be subject to the Bagley-Keene Open Meeting Act. This means that all of its meetings would be noticed and its agenda published. As well, the meetings would be open to the public and accessible to all, including persons with disabilities.

The Members of the Legislature who are appointed to the CCDA would serve at the pleasure of the appointing powers, while the public member appointees would serve four-year terms. Public members would receive travel expenses and a per diem of \$100 while on official business of the CCDA, which would not exceed 12 days per year.

In keeping with its general charge of monitoring compliance with state laws and regulations governing accessibility of places of public accommodation by persons with disabilities, the CCDA would:

- Study and make reports to the Legislature on several issue areas, such as compliance with state laws, conflicting federal law and regulations that might create compliance issues within the state, the efficacy of the Certified Access Specialist Program, training and education requirements for personnel involved in designing, plan checking, building or inspecting a structure and for architects, professional engineers, and contractors to ensure these professionals have sufficient knowledge of the state and federal disability access laws and regulations. This study and report would be due no later than July 1, 2010;
- Act as an information center on the status of compliance in California, and to this end would publish an annual report;
- Coordinate with other state agencies and local building departments to ensure that information disseminated to the public on disability access requirements are uniform and complete;
- Provide, within its resources, technical and consultative advice to groups or persons concerned with minimizing problems of compliance by undertaking educational outreach efforts and by hosting on its Internet Web site a Guide to Compliance with State Laws and Regulations Regarding Disability Access Requirements;
- Develop, prepare, recommend, or coordinate materials, projects, or other activities as appropriate.

A major task of the CCDA would be the development, in consultation with the staff of the California Building Standards Commission, of a master checklist for disability access compliance that may be used by building inspectors. This task must be completed no later than July 1, 2010.

Finally, the CCDA would be required to study the operation of the new procedure established by the bill and to assess whether or not the procedure is operating to achieve its desired goal of reducing unnecessary civil actions that seek attorney's fees and damages but do not facilitate or advance compliance with state laws and regulations governing disability access. This study and report of findings would be due no earlier than July 1, 2013 and no later than July 1, 2014.

Proponents of SB 1608 believe that a commission specifically tasked with monitoring compliance with the state's full and equal access laws would help bring about a higher degree of compliance in a shorter time than has been achieved by decades of rulemaking, litigation, and countless hours of negotiations. Further, they believe that in order to find long-term solutions for the problems of accessibility, a commission specially focused on this issue area could channel public and private resources and information more efficiently.

The authors acknowledge that some details regarding the Commission are still under discussion and may be revised, in consultation with the Committee, in response to opposition concerns as the bill moves forward.

ARGUMENTS IN SUPPORT: According to the Consumer Attorneys of California (CAOC), SB 1608 “meets the honorable goal of enacting a number of provisions that will increase disability access in the state of California while at the same time creating some reasoned changes for early court review of specified cases. ... CAOC believes that California’s disability access laws should continue to ensure equal access to business establishments for persons with disabilities. ... We believe that the goal of any ADA lawsuit should be to ensure compliance. The Legislature, when reviewing any proposed changes to this law, must ensure that disability access is protected and enhanced. SB 1608 passes that test.”

CAOC further supports SB 1608, it states, because it addresses specific and documented problems. “We believe that the creation of an access commission and better educational requirements are essential to ensuring access in California. Further, we are concerned about cases where compliance is not the primary goal. SB 1608’s provisions directly address that issue by (1) ensuring more compliant buildings as businesses have a direct incentive to obtain CAsp certification – with more buildings in compliance, there will be fewer lawsuits; and (2) establishing an early court review and stay procedure for those suits that are brought.”

The California Chamber of Commerce believes that SB 1608 responds to “a small but widely destructive, atypical group of plaintiffs and lawyers using disability laws and [the] court system to systematically extract monetary settlements from businesses rather than to seek access. All too often, the result has been businesses closing their doors for good, which is not the purpose of the access laws...Businesses have both a vested interest and responsibility to comply with disability access laws. At the same time, California’s laws should facilitate and acknowledge the efforts of businesses who desire to comply and take steps accordingly. We believe SB 1608 strikes a fair and reasonable balance.”

In support of the bill, the California Foundation for Independent Living Centers (CFILC) argues that SB 1608 takes a comprehensive approach to solving a complex and multilayered issue: how to increase construction related accessibility to business and services in California. “For years we have seen bills proposed that undermine the civil rights of people with disabilities, while allowing businesses time to come into compliance with laws that have existed for decades... This bill would establish for the first time minimum continuing education requirements for architects and building inspectors regarding disability access laws and compliance...would establish an independent Disability Access Commission that would be focused on assessing, monitoring, and reporting the state of access in California. This commission would create a sustained opportunity to identify and report and advocate increasing access in California....[and] would provide an incentive for businesses to engage a Certified Access Specialist to assess construction related access barriers, and obtain necessary recommendations to come into compliance. A business would be eligible for an early evaluation conference only if they have taken the proactive step to hire a CAsp inspection...Unlike other legislative attempts, the use of an early evaluation conference will lower the cost of attorney’s fees for businesses, without compromising the civil rights of a person with a disability to seek damages, this idea is a breakthrough.” (CFILC letter dated April 25, 2008.)

Protection & Advocacy, Inc. (PAI) states that its position is support if amended. "For the most part, SB 1608 meets the goal of enacting a number of provisions that will increase disability access in the state of California while at the same time creating some reasoned changes for early court review of specified cases." However, PAI has some concerns, specifically: "We

recommend that the bill use people first language throughout. Under state and federal law, places of public accommodation are required to make “readily achievable changes” to existing structures. A determination of which barrier removals would be “readily achievable” involves an evaluation of such issues as the cost of removal and if the entity can bear the costs. *Hodges v. El Torito Restaurants, Inc.*, 92 F.Supp.2d 1091, 1095 (N.D. Cal. 1998). CASps are not trained to make such a determination nor will they have access to a business’ financial information. Therefore, they cannot conclude whether a barrier removal is readily achievable. As currently worded, the bill implies that a CASp can make such a determination when in fact they may not be able to because, depending on when the facility was built or altered, the entity may only be required to make readily achievable barrier removals.

Damages are available under state law when a person encounters access barriers or is deterred by access barriers from frequenting a public accommodation. As currently worded in section 55.56 of the bill this distinction is not clear and changes the law in regards to damages. *Arnold v. United Artists*, 866 F.Supp. 433 (N.D.Cal. 1994); *Donald v. Café Royale, Inc.*, 218 Cal.App.3d 168 (1990). As currently worded section 55.55 conflicts with provisions in the Code of Civil Procedure and the Evidence Code in regard to settlement offers in determining attorney fees. Code of Civ. Pro. § 998; Evid. Code § 1152.

ARGUMENTS IN OPPOSITION: Californians for Disability Rights, Inc. (CDR) is opposed to some of the provisions of SB 1608 as currently in print, stating:

The purpose is stated to improve access for California’s 6.5 million persons with disabilities; but in fact SB 1608 brings significant harm to those it seeks to protect.

SB1608 proposes to allow any person to appeal an access code decision of the local building official to Sacramento. Our local communities will not have staff or legal assistance to defend such frivolous appeals – and the result will be a reduction in enforcement of the access laws merely through a threatened appeal. CDR urges the authors to retain the existing law without modification, as it has served the state well by requiring both the building official and the appellant to concur that there is an issue of statewide significance.

SB 1608 proposes to allow a building owner or tenant, after a certified access specialist is hired and the work performed, to place a “Certificate” alluding to meeting access construction requirements. The access guidelines of the ADA [ADAAG] and the state building codes outline the minimum requirements that must be met to serve “most” persons with disabilities. Given the wide array of disabling conditions, no single set of construction codes or guidelines will ever serve every person with a disability. Such a “Certificate” may and will be used to defend actions performed as being the total requirement necessary to meet the access needs of a person wishing to utilize such a business. The ADA and the State non-discrimination laws are civil rights laws – and such a certificate may be misused as a license to discriminate, albeit unintentionally by some.

SB 1608 proposes to change the language in civil codes that defines deterrence as experienced by a person with a disability. These seemingly minor word changes will

have a significant and harmful impact on any person with a disability that seeks redress for and injunctive relief from barriers to access.

SB 1608 proposes certain legal proceedings for business owners that have hired a CASp. CDR strongly recommends an adoption of those segments of the General Order 56 as used in the Northern Court Districts. This would

CDR has a strong record of supporting the small businesses that comprise the majority of our local community enterprises; and encourages that proactive and positive steps be taken to notify them of the rights and obligations, not just after a court filing for non-compliance, but as an ongoing effort to truly move access forward.

SB 1608 needs to be amended to clarify damages and attorneys fees in such a manner that there is equity and fairness.

CDR recognizes that the authors, by including annual training requirements, wish to improve the likelihood of access compliance. However, SB 1608 does not go far enough. There is an appalling lack of training in our colleges and universities on the aspects of meeting the needs of persons with disabilities, whether it be in building and community design or designing accessible web pages. It seems foolhardy to place continuing education requirements on professions, when there is no requirement for the initial education in our state college and university curriculums.

CDR remains concerned with troubling aspects of the proposed commission on disability access. It is stated that it is fashioned on the commission on the status of women, yet, unlike the Equal Rights Amendment, the Americans with Disabilities Act has been law to enforce for over eighteen years. The appropriate agencies and bodies have issued regulations that must be enforced, yet this commission is stated to be a body to study and advise on aspects of access. If it were more appropriately a body to bring about enforcement of the existing requirements – or even a body to disseminate information on the existing requirements of law....it would make more rational sense. As constructed as a political entity, it may and will be used to delay and obstruct, not to enhance and enforce access for persons with disabilities. CDR recommends a change in focus to one of information, enforcement and compliance as the best and most logical way to reduce legal actions to force compliance. CDR also recommends that any such commission must need be formed by persons with expertise in the field of access barrier removal, and physical access needs as required under the laws.

A coalition of 47 organizations and individuals, including California Council of the Blind (CCB), NorCal Center on Deafness, California Association of State Employees with Disabilities and individual attorneys, disability rights advocates and persons currently serving as consultants regarding disability access, have joined in a letter expressing concerns with the bill as it appears in print, and arguing for amendments, stating:

We do not feel that the complexities of SB 1608 will improve disability access nor do we believe that this legislation will achieve its intended “unstated” goal of reducing profiteering by unscrupulous litigants suing well meaning small businesses who may not be aware of ADA access regulations in this bill’s current form.

We would remove our opposition to this legislation if proponents would meet five areas of concern:

1. The damages clause of the bill on page 3 needs to be deleted that states “The bill would provide that damages may be recovered only for a violation of a construction-related accessibility standard that personally and actually deterred the plaintiff.” The damages provision under the proposed Civil Code Section 55.56 regarding the award of damages needs to be re-written because the language is ambiguous and can lead to interpretations that are confusing and counter to case law regarding the issue of encountering barriers and deterrence. For example, if a person is able to eat in a restaurant but afterward can't use the restroom and must leave the building, a court could rule that the person was not actually deterred from using the facility as they were actually able to eat a meal there.
2. Apply the early evaluation style of conference as described in Ca. northern district court's “Special order 56.” Along with minimum standards for the “CAS” report such as review of all construction and permit documents; current, joint inspection; and NO general building certification.
3. Maintain the current appeals process through the building standards commission allowing building owners to appeal every local accessibility decision to Sacramento creates a situation that neither the community, nor local building departments, we think), are equipped to deal with. Such appeals will seriously degrade access.
4. The proposed section 55.55 states that the court may consider in the award of attorney fee's and costs settlement offers made and rejected by the parties. This sets up a separate inequitable standard for cases involving disabled access that will promote discovery in cases, thereby increasing legal costs. This needs to be amended to state instead that the court may consider “written settlement offers per Code of Civil Procedure § 998.”
5. A clear majority of persons with disabilities on disabled access commission with all members having a history of working with access regulations/codes.

The Disability Rights Education & Defense Fund (DREDF) likewise seeks further amendments to the bill, stating that "there is no commitment to such necessary further steps as mandating training and additional education requirements for all building professionals in California, or involving state agencies, local building departments, and local chambers of commerce in the dissemination of accurate and complete information about federal and state disability access requirements to the public and the business community. Moreover, the decisions and actions of the CASp, the bill's primary means for 'enforcing' compliance with disability access standards, is undermined by a newly created appeal mechanism under which business owners and operators can unilaterally appeal CASp actions and decision to the California Building Standards Commission. The California Building Standards Commission is not placed under any additional obligations to become further aware of or equipped in state and federal accessibility laws and issues, even though that forum has not historically proven itself responsive to concerns about disability inaccessibility.

In exchange for these limited mechanisms for increasing accessibility, Californians with disabilities must place their trust in a yet-to-established program in which CASp will have

unprecedented authority to determine “that the [public accommodation] site meets applicable construction-related accessibility standards.” See proposed § 55.53(e) of the Civil Code. Such a determination can ostensibly be made despite the fact that the CASp is not necessarily given access to financial records or the training needed to determine whether the public accommodation has undertaken “readily achievable barrier removal” in existing facilities. The CASp inspection will initiate a procedure that will inhibit the average plaintiff with a disability from challenging construction-related barriers encountered in public accommodations because: i) any lawsuit they bring may be subject to a stay (proposed § 55.54(b) of the Civil Code); ii) they will have to understand construction-related standards enough to produce “an itemized list of specific conditions” that are the basis of their claims (proposed § 55.54(d)(5)); iii) reputable attorneys with both expertise in construction-related standards and willingness to take on cases will become rarer since such lawsuits in California will be additionally complicated by this bill and the determination of reasonable attorneys’ fees will be subject to additional considerations beyond those that already exist (proposed § 55.55 in Civil Code). The practical impact of the stay procedure is likely to discourage even those claims in which the person with a disability experiences lack of programmatic accommodation and outright hostility in addition to physical access barriers since court are directed to issue a stay for any civil claim “based wholly or in part on an alleged violation of any construction-related accessibility standard.” See proposed § 55.52(a)(1)."

"While some of the specifics of information exchange and the “mandatory early evaluation conference” ostensibly do not apply to non-construction related aspects of a claim, a plaintiff is nonetheless directed to inform defendants of “any demand for settlement of the case in its entirety.” See § 55.54(d)(5)(D). This would be the case even though the plaintiff is only entitled to a CASp report, and will not receive any information back from the public accommodation concerning its procedural or policy modifications or employee training. Moreover, even if non-construction-related discrimination claims clearly fell out of the purview of this bill, it would be very difficult for the average plaintiff to somehow separate out of his or her experience of discrimination those elements of damages, attorneys’ fees and settlement that relate only to construction-related barriers."

"DREDF also finds the scope of SB 1608 to be problematic. The bill applies to all privately owned places of public accommodation, including such large entities as corporations, universities, and hospitals. “Construction-related accessibility standard” is broadly defined as “a provision, standard, or regulation under state or federal law requiring compliance with standards for making new construction and existing facilities accessible to persons with disabilities.”” See § 55.52(a)(6). This means that, for example, a large privately-owned for-profit hospital that receives federal financial assistance in its emergency department, and is subject to Section 504 of the Rehabilitation Act as a condition of accepting that funding, could obtain CASp certification and obtain a stay of any construction-related access claim. Such entities and their counsel will hold great advantage over individual plaintiffs with disabilities under the stay procedures. It must also be remembered that any procedural complications SB 1608 places in the way of so-called “serial access litigants” and attorneys will impede all plaintiffs with disabilities, as well as those few public interest/civil rights attorneys that remain willing and able to undertake construction-related access litigation.

REGISTERED SUPPORT / OPPOSITION:Support

American Electronics Association
Association of California Insurance Companies
Building Owners and Managers Association of California
Consumer Attorneys of California
California Chamber of Commerce
California Hotel and Lodging Association
California Owners and Managers Association of California
California Apartment Association
California Architects Board (if amended)
California Association of Joint Powers Authorities
California Business Properties Association
California Car Dealers Association
California Citizens Against Lawsuit Abuse
California Downtown Association
California Farm Bureau Federation
California Independent Grocer Association
California Lodging Industry Association
California Manufacturers and Technology Association
California Metals Coalition
California Restaurant Association
California Retailers Association
Central California Citizens Against Lawsuit Abuse
Central Coast Center for Independent Living
City Gate Togo's Eatery
Civil Justice Association of California
Enterprise Rent a Car
Gas Club
Institute of Real Estate Management
International Council of Shopping Centers
Lawyers Against Lawsuit Abuse APC
LDA Partners, LLP
Los Angeles Citizens Against Lawsuit Abuse
Mc Henry Village Togo's Eatery
National Association of Industrial and Office Properties
National Federation of Independent Business
Northern California Citizens Against Lawsuit Abuse
Orange County Citizens Against Lawsuit Abuse
Personal Insurance Federation of California
Regional Legislative Alliance
San Diego Citizens Against Lawsuit Abuse
State Farm Insurance
Wine Institute
California Foundation for Independent Living Centers
California Disability Community Action Network
Protection and Advocacy, Inc. (if amended)

Placer Independent Resource Services
Disability Rights Legal Center

Opposition

California Association of State Employees with Disabilities
Californians for Disability Rights, Inc.
California Council of the Blind
Disability Rights Education & Defense Fund (DREDF)
Food and Beverage Association of San Diego
NorCal Center on Deafness
Numerous individuals

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